

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GENNARO AND FRANCES MILO	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Years 1980 and 1981 and	:	
Unincorporated Business Tax under Article 23	:	
of the Tax Law for the Year 1980.	:	

Petitioners, Gennaro and Frances Milo, 529 Eighth Avenue, New Hyde Park, New York 11040, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1980 and 1981 and unincorporated business tax under Article 23 of the Tax Law for the year 1980 (File No. 800800).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 10, 1988 at 10:45 A.M. Petitioners appeared by Bernard Goldberg, CPA. The Audit Division appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether additional income attributed to Mr. Milo by an audit based on the excess of disbursements, including living expenses, over the sum of the income reported on his return and withdrawals from his banks should be further reduced by: \$20,000.00 representing the receipt of nontaxable amounts as the repayment of a loan; an amount of \$6,000.00 as interest income from a mortgage; \$2,400.00 as representing rental income received; \$1,040.00 as representing food eaten in his own restaurant; and by the amounts of \$8,000.00 and \$2,717.00 related to a money market fund and \$704.00 related to interest expenses.

FINDINGS OF FACT

1. Petitioners, Gennaro and Frances Milo, live at 529 Eighth Avenue, New Hyde Park, New York. Mr. Milo operates a restaurant at 559 Larimer Street, Brooklyn, New York. The restaurant reported sales of \$70,729.00 and net profit of \$6,351.00 in 1980 and sales of \$72,617.00 and net profit of \$7,575.00 in 1981.

2. (a) An audit was performed of Mr. Milo's income tax returns for the years in issue. (Any amounts attributed to Mrs. Milo in the tax returns or otherwise were ignored.) The auditor

determined the amount of cash disbursed by Mr. Milo, specifically deposits into checking and savings accounts, added an amount of \$5,160.00 each year for living expenses (\$2,600.00 of which was for food), and deducted therefrom the income reported by Mr. Milo on his tax returns and withdrawals from bank accounts.

(b) The 1980 income tax deficiency is based on a finding of additional income of \$20,236.00 and a medical expense adjustment of \$607.00. The 1981 deficiency is based on additional income of \$25,008.00, as reduced by an additional standard deduction of \$498.00. The 1980 unincorporated business tax deficiency is based on additional income of \$20,236.00.

(c) Later, after a prehearing conference, the auditor further reduced the additional income by \$1,500.00 for both 1980 and 1981 (an allowance for food eaten at the restaurant) and by an additional \$1,970.00 for 1980. These adjustments were made to both the income and unincorporated business tax deficiencies.

3. (a) A Notice of Deficiency for income tax under Article 22 of the Tax Law for 1980 and for the New York City earnings tax on nonresidents under Title U of the Administrative Code of the City of New York was issued on October 31, 1983 in the amount of \$2,306.00, plus penalty for negligence under Tax Law § 685(b) of \$115.00 and interest of \$687.23, for a total of \$3,108.83.

(b) A Notice of Deficiency for income tax under Article 22 of the Tax Law for 1981 and New York City earnings tax on nonresidents under Chapter 46, Title U of the Administrative Code of the City of New York was issued on October 31, 1983 in the amount of \$2,842.00, plus penalty for negligence under Tax Law § 685(b) of \$142.00 and interest of \$501.31, for a total amount due of \$3,485.31.

(c) A Notice of Deficiency for unincorporated business tax under Article 23 of the Tax Law for 1980 was issued on November 30, 1983 in the amount of \$652.00, plus penalty for negligence under Tax Law § 685(b) of \$33.00 and interest of \$194.03, for a total of \$879.03.

(d) These deficiencies totalling \$5,800.00 in tax, plus interest and penalty, were reduced after a conference to \$4,406.00, plus interest and penalty.

4. (a) For proof of a loan to his son Michael, and the repayment back in 1980, petitioner submitted a letter from Michael Milo dated July 21, 1983 stating that he borrowed \$20,000.00 from his father in 1979 and paid him back in 1980. Michael claims that he paid back a lump sum of \$14,000.00 (\$7,000.00 from a specified bank loan, \$5,000.00 from a specified savings account, and \$2,000.00 from an employee savings plan), and \$6,000.00 in monthly installments of \$500.00 to \$1,000.00 each based upon overtime wages earned.

(b) As further proof of the loan to his son in 1979, petitioner submitted a real estate contract for the sale of property located at 522 Eighth Avenue, New Hyde Park, New York dated May 21, 1979 showing a price of \$65,000.00, with \$3,250.00 due at the time of the contract and \$61,750.00 due at the closing on August 1, 1979, subject to obtaining a mortgage of \$47,000.00. Petitioner also submitted a teller's check written on Bankers Trust Co. by College Point Savings Bank on July 27, 1979 for \$14,750.00, signed by Michael Milo and the sellers of the real estate. Petitioner further submitted Mr. Milo's check for \$5,000.00 to cash dated November 10, 1979 and noted as "Loan - Mike".

(c) As proof of the repayment of the loan by Michael Milo in 1980 and 1981, petitioner

produced checks of Michael Milo in 1980 written to cash and endorsed by petitioner Gennaro Milo totalling \$1,970.00 and five receipts from petitioner written to Michael Milo during 1980 totalling \$14,000.00.

(d) At the prehearing conference, the auditor allowed \$1,970.00 in reduction of the income attributed to Mr. Milo.

(e) Neither Gennaro Milo nor Michael Milo testified at the hearing.

5. Petitioner claims to have received \$6,000.00 interest income from a mortgage in 1981. This amount was not part of the income attributed to Mr. Milo by the auditor. However, this \$6,000.00 also did not appear on the 1981 tax return of Mr. Milo (though the 1980 tax return did show an amount for mortgage interest received). This mortgage interest has no connection with the restaurant business.

6. Mr. Milo's tax returns included rental income of \$3,060.00 in 1980 and \$4,500.00 in 1981. The auditor included these amounts as sources of income for the respective years. These amounts included \$2,400.00 a year which Mr. Milo claimed was received as rental income.

7. Mr. Milo claimed that he ate food at his restaurant worth a value of \$1,040.00 a year. This amount was included in the \$1,500.00 a year reduction allowed by the auditor after the prehearing conference.

8. No evidence or argument was received pertaining to the amounts of \$8,000.00 and \$2,717.00 relating to a money market fund, nor \$704.00 relating to interest expenses.

CONCLUSIONS OF LAW

A. The claim that Mr. Milo received repayments of a loan in 1980 must be rejected. The documents produced by petitioners, the \$14,750.00 teller's check and the \$5,000.00 check noted as a loan, are persuasive evidence that a loan was made to Michael Milo in 1979. The proof of repayment of the loan to Mr. Milo is, however, not satisfactory. Where there was some proof of actual payment, as with the \$1,970.00 in checks written by Michael Milo, the auditor has allowed such amounts. However, the five receipts of Mr. Milo totalling \$14,000.00 are entirely self-serving. Petitioners did not explain why such large sums would have been paid in cash or, if paid by check, why no cancelled check could be produced. Though Michael Milo states that he obtained the money from specified sources, no documentation for such sources has been provided. The further statement of Michael Milo that monthly installments of \$500.00 to \$1,000.00 were made appears inconsistent with the receipts written by Michael Milo which are all in larger amounts and, for that matter, the statement is inconsistent with the checks for \$1,970.00 accepted by the auditor which are all smaller in amount. The fact that neither Mr. Milo nor his son testified justifies the weighing of the evidence most strongly against the taxpayer.

B. The amount of \$6,000.00 representing income from a mortgage has been shown to be unreported on the 1981 income tax return and an income tax is due on such sum (although the period of limitation on assessment for 1981 has expired). Petitioners' further claim that this \$6,000.00 should not be considered part of the income of the unincorporated business is academic since no deficiency is in issue in this case for 1981 unincorporated business tax.

C. The \$2,400.00 rental income and \$1,040.00 food use for each year have been shown to have been taken into account by the auditor. No further adjustment is proper.

D. The \$8,000.00 and \$2,717.00 amounts attributable to the money market fund and the \$704.00 attributable to interest expenses are disallowed for failure of proof.

E. The petition is granted to the extent indicated in Finding of Fact "3(d)"; the notices of deficiency issued November 30, 1983 are to be modified accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
December 1, 1988

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE